
(2013) 09 J&K CK 0008

In the Jammu And Kashmir High Court

Case No : Petition No. 211 Of 2012 and Cr.M.A. Nos. 242, 247 Of 2012

Rajni Kant Tiwari

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 27-09-2013

Acts Referred:

Citation : (2014) 2 JKJ 37

Hon'ble Judges : Janak Raj Kotwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Janak Raj Kotwal, J.—This petition seeks invoking of the inherent jurisdiction of this Court u/s 561-A of the Code of Criminal Procedure

(for short the Code) for quashing First Information Report (FIR) No. 15/2012 dated 14.01.2012 u/s 363 RPC of Police Station, Akhnoor.

Heard. I have perused the record.

2. I may state, briefly, the facts emerging from the record produced by the petitioner, which are essential to dispose of this petition:

3. Petitioner and respondent No. 3 are husband and wife. They got married on 08.07.2003 and are blessed with a male child, Ruchir Tiwari. Their

matrimonial life, however, remained disturbed inasmuch as respondent No. 3 had lodged an FIR under secs. 498-A, 323, 504, 506, 427 IPC

read with Sec. 3/4 Dowry Prohibition Act against the petitioner and his family members at Police Station, Lanka, District, Varanasi (UP) which

was registered as Crime No. 89/2009 dated 14.3.2009. However, at a later stage parties had arrived at a compromise. In April, 2011 petitioner,

who is Major in Indian Army, was transferred to Akhnoor in J & K State.

Respondent No. 3 along with their son joined the petitioner at Akhnoor.

On 30.12.2011, petitioner filed application u/s 100 of the Code in the court of learned Judicial Magistrate, 1st Class, Akhnoor. He alleged that on

his return to Akhnoor after availing leave, he found his house locked from outside. Whereabouts of his wife and son were not known. On breaking

open the locks of the house, he found that gold items and cash were also missing. He came to know that his father-in-law with the help of some

goons has forcibly removed his wife and child and has confined both of them in his house at Varanasi. Petitioner, therefore, sought issuance of

search warrant u/s 100 of the Code for their search and producing them before the court. Learned Judicial Magistrate after hearing petitioner's

counsel, issued search warrant directing SHO, Police Station, Akhnoor to search the house of the father (Chander Dev Pandey) of respondent No.

3, situate at Plot No. 36/37, Madhav Market, Colony Lanka, Varanasi (UP) and produce the respondent No. 3 and child, Ruchir Tiwari, in the

Court on 21.01.2012.

4. Order passed by the learned Magistrate on 28.01.2012, copy whereof has been produced by the petitioner, would show that the respondent

No. 3 and the child were produced before the learned Magistrate on 12.01.2012 in compliance with the search warrant issued by him. As

respondent No. 3 wanted to make her statement in presence of her father so the learned Magistrate kept them on sapurdari of one K.P. Dubey

with a direction to appear on 14.01.2012 and posted the matter for 14.01.2012. Respondent No. 3 attended the court on 14.01.2012 but the

petitioner did not turn up. The order passed by the learned Magistrate on 28.01.2012 (supra) read with FIR No. 15/2012 (supra) registered with

Police Station, Akhnoor on 14.01.2012 would show that on 14.01.2012, respondent No. 3 had filed an application before the learned Magistrate

alleging that on that day she along with her family members was sitting in the court room. Suddenly her husband (petitioner herein) and his two

brothers, Krishan Kant Tiwari and Ajay Tiwari came there and forcibly removed the child, Ruchir Tiwari, from her lap and took him away by an

Army Jeep to some unknown place. She, thus, alleged that the child has been kidnapped by the petitioner along with four army personnel. Learned

Magistrate forwarded the complaint to SHO, Police Station, Akhnoor with a

direction ""to register FIR against the accused and take strict necessary action under law"". On this application FIR No. 15/2012 u/s 363 RPC has been registered, which is sought to be quashed in this petition.

5. Petitioner seeks quashing of the FIR on the ground that the allegations leveled by the respondent No. 3 are false, baseless and frivolous and do

not disclose any prima facie case against the petitioner even if the contentions in the FIR are taken at their face value. No offence is made out

against the petitioner. Since the petitioner is natural guardian of the child, he cannot be legally accused of kidnapping his own son. While not

refusing that on 14.01.2012 he had removed the child from the court premises, the petitioner has contended that on 12.01.2012 when respondent

No. 3 along with the child of the petitioner had appeared in the court, the child on seeing him had started shouting saying 'PAPA' 'PAPA' and

wanted to come in his arms. However, he was not allowed by his mother. On 14.01.2012, he came to attend the court proceedings, he was

standing in the court premises, the child on seeing him came to his arms shouting 'PAPA' 'PAPA' and started saying that he does not want to go

back to his mother and wants to stay with him. On seeing this, respondent No. 3 and her father thought that the minor may not agree to go with

them so father of respondent No. 3 started extending threats to the petitioner.

6. Mr. M.M. Baru, learned counsel for the petitioner submitted that the petitioner, being father and thereby natural guardian of the minor, cannot

be said to have committed offence of kidnapping his own son even if he had taken the child with him from the court premises. Learned counsel,

therefore, submitted that no prima facie case of kidnapping is either disclosed in the FIR or is constituted and the FIR is liable to be quashed. In

support, Mr. Baru relied upon Khyali Ram and Others Vs. State of U.P. and Another, .

7. Per contra, Mr. Salim Malik, Dy. AG appearing vice Gagan Basotra, Sr. A.A.G. submitted that the judgment relied upon by the learned counsel

for the petitioner would not apply in this case. The petitioner by invoking judicial process had secured the presence of the child in the court had

taken him away without waiting for the judicial order in this regard.

8. High Court u/s 561-A of the Code (sec. 482 of the Central Code) is vested with inherent jurisdiction to make such order as may be necessary

to give effect to any order under the Code or to prevent abuse of process of any Court or otherwise to secure the ends of justice. This jurisdiction

of the High Court can be invoked to seek quashing of FIR and investigation by the police or any criminal proceedings pending in any Court if it is

shown to the satisfaction of the Court that such proceedings is the abuse of process of that Court or tends to cause miscarriage of justice or the

quashing is otherwise required to secure the ends of justice. The jurisdiction of the High Court is vast indeed but this jurisdiction is to be exercised

cautiously, carefully and sparingly and the Court has not to function as a Court of appeal or revision. Supreme Court in State of Haryana and

others Vs. Ch. Bhajan Lal and others, , has given categories of cases by way of illustration wherein such power can be used either to prevent the

abuse of process of Court or to secure the ends of justice. The categories are:

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1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their

entirety do not prima facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence,

justifying an investigation by police officers under S. 156(1) of the Code except under an order of a Magistrate within the purview of S. 155(2) of

the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the

commission of any offence and make out a case against the accused.

4. Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is

permitted by a police officer without an order of a Magistrate as contemplated under S. 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever

reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the

Code or the Act concerned (under which a criminal proceedings is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceedings is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge".

9. In Khyali Ram's case (supra) Allahabad High Court in somewhat but not exactly similar situation has observed that ""Applicant Khyali Ram is admittedly the father of the minor Kalua as Khyali Ram is the natural guardian even if he has removed the minor from the custody of the mother

there is no question of committing an offence u/s 363 Indian Penal Code"". High Court has gone further observing that ""in order to constitute an

offence under section 363 IPC there must be kidnapping of a person from lawful guardianship. Here Khyali Ram is himself the lawful guardian of

the child. It cannot, therefore, be said that he committed an offence u/s 363 of IPC by getting the custody of his own son from his wife".

10. High Court made further observation in para. 5, which reads:

No doubt, u/s 6 of the Hindu Minority and Guardianship Act, 1956, the custody of a minor who has not completed the age of five years shall

ordinarily be with the mother but the father being the natural guardian of a Hindu minor cannot be held to have committed an offence of kidnapping

by removing his minor son from the custody of the mother.

11. The High Court therefore, quashed the order passed by learned Magistrate taking cognizance u/s 363 IPC.

12. The Khyali Ram's case, however, would not apply in this case given the significant difference in fact situation of the two cases. In Khyali Ram's

case, as the order rendered by the High Court would show, child was removed from the custody of the mother and High Court was of the view

that offence of kidnapping u/s 363 IPC is not made out. Situation in this case, however, is not only different but peculiar and raises a serious

question about the conduct of an Army Officer, who after submitting himself to legal process as long as it suited him has violated law when it suited

him otherwise. Petitioner secured presence of the mother and the child in the

court by invoking jurisdiction of the Magistrate u/s 100 of the Code.

In his presence the mother and the child were produced before the Magistrate on 12.01.2012 and both of them were kept on Supardari of one

K.P. Dubey with a direction to appear before the court on 14.01.2012. Petitioner has admitted his presence before in the Court of learned

Magistrate on 12.01.2012 in para. 31 of his petition. All of them came in the court on 14.01.2012. On 14.01.2012, the child as a matter of fact

was not in the custody of his mother only but was in custodia legis, having been kept on sapurdari by order of the Magistrate. The alleged forcible

removing of the child by the petitioner, therefore has taken place at a time when the child was in custodia legis so the benefit of the judgment in

Khyali Ram's case, in Khyali Ram's case, relied upon by the petitioner's counsel would not be available.

13. Petitioner's contention that his child has of his own come to the petitioner too would not weigh against respondent No. 3's allegation that

petitioner and his accomplice had removed the child forcibly and left the court premises by an army jeep. Petitioner's contention, though not

sufficient to dislodge respondent No. 3's allegation at this pre investigation stage, however, loses its genuineness by the conduct of the petitioner

himself. Petitioner having secured presence of the child in the court by using the process of the court, has not stated in the petition as to why he did

not feel it proper to bring the incident to the notice of learned Magistrate immediately or when the case would have been called and why did he left

the court without attending the hearing. Allegation of the respondent No. 3 when considered in light of petitioner's admission that he had removed

the child from the court premises on that day, makes out not only a prima facie case but a strong prima facie case of kidnapping against the

petitioner and question of quashing of FIR at pre investigation stage does not arise. For the aforementioned, petition is dismissed as without any

merit.